

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

OCT 18 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations	)	MM Docket No. 91-221
Governing Television Broadcasting	)	
	)	
Television Satellite Stations Review of	)	MM Docket No. 87-8
Policy and Rules	)	

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**  
**OF KENKEL & ASSOCIATES**

Kenkel & Associates ("Kenkel"), a law firm representing various broadcasters before the Federal Communications Commission (the "Commission"), hereby petitions the Commission to reconsider in part its Report and Order in the above-captioned proceeding, adopted August 5, 1999, and released August 6, 1999, 64 Fed. Reg. 50651 (1999) (the "Report and Order").<sup>1/</sup> Although Kenkel did not comment in the proceedings leading up to and culminating in the Report and Order, Kenkel believes that the public interest compels the Commission's consideration of the facts and issues presented herein with respect to a portion of the Report and Order. This petition is therefore properly filed pursuant to Section 1.429(b)(3) of the Commission's Rules. 47 C.F.R. § 1.429(b)(3) (1998).

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<sup>1/</sup> The Report and Order was published in the Federal Register on September 17, 1999. Accordingly, this Petition for Reconsideration is timely filed. 47 C.F.R. § 1.429(d) (1998).

1.. Kenkel believes that the Commission's decision to allow waivers of the duopoly rule and to allow same-market licensees to own unbuilt analog stations only under certain, limited circumstances is too narrow in focus and that such ownership should be permitted in all cases. Regardless of the number of voices in the market, acquisitions of all unbuilt analog stations should be exempt from the Commission's duopoly rule, and, once they are constructed, the Commission should permit sales of such duopolies as a single group.

2. A relatively small, finite number of pending applications and issued construction permits exist for as yet unbuilt new NTSC broadcast television stations.<sup>2/</sup> This small group of affected applicants for and permittees of the last of the unbuilt analog stations, finds itself in a unique situation, trapped in the difficult, expensive and risky transitional phase from analog to digital broadcasting. These applicants and permittees are faced with the prospect of constructing costly facilities that will be largely obsolete in a matter of years, without the security of a paired DTV channel on which to broadcast after the transition to digital television is complete. The Commission has repeatedly acknowledged the problems and challenges facing television stations as they anticipate a digital future and other changes in the media environment, and the Commission has provided for flexibility and relaxation of rigid Commission policies that might otherwise sound the death knell for these stations. See Report and Order at ¶¶ 41, 59, 87, 106; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment and the

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<sup>2/</sup> All vacant NTSC television allotments have been deleted and no petitions to add new NTSC allotments are being accepted. Report and Order at ¶ 84.

Broadcast Industry: Reexamination of the Commission's Cross-Interest Policy, Report and Order, FCC 99-207, released August 6, 1999, at ¶ 106.

3. Applicants and permittees for these stations must have faith in a system that has not yet assured them of a future in the digital world -- i.e., a DTV channel allotment. These few applicants and permittees, who will be providing valuable service through the construction of the last of the NTSC stations in this country, increasingly need the support of the Commission to remain viable. Accordingly, the Commission must nurture the construction of these stations. These stations stand the best chance of surviving and ultimately succeeding if the Commission simply relies on marketplace forces to bring service to the public in the quickest possible manner. In certain circumstances, that may mean that an in-market licensee will be in the best position to shoulder the financial burden of constructing an unbuilt analog station. By foregoing regulatory intervention (*i.e.*, the duopoly waiver requirements) in favor of the unfettered sale of unbuilt stations, the Commission will be doing something quite tangible to facilitate the construction of these stations and the provision of new broadcast service to the American public.

4. The "eight independent voice" component of the Report and Order's modification of the television duopoly rule makes relief from the rule unlikely in many mid-sized and virtually all smaller markets, where such relief is arguably most needed. Smaller stations must compete against multi-channel competitors such as cable and direct broadcast satellite services in markets with limited advertising revenues. Licensees in these markets, particularly those involving unbuilt stations facing the acute problems outlined above, should not be denied the relief from the

Commission's duopoly rule afforded those broadcasting in larger markets. Rather, the Commission should strive to make reasonable duopoly relief available in all markets.

5. It is important to note that if the Commission grants the relief requested, there will be no *loss* of voices in the affected markets. Rather, there may be an ultimate loss of *stations* if the Commission does not allow the sale of unbuilt stations to same-market licensees. Applicants and permittees may find themselves unable to build new analog stations, particularly as the clock continues to march inexorably toward analog's last day. But if construction permits could be sold without ownership restriction to entities willing to build those analog facilities, entities that can tolerate the uncertainty of the digital future, these stations have a greater chance of being built so that they may one day serve the public. As the Commission itself has stated: "A station that has gone unbuilt . . . cannot contribute to the diversity of competition. On the other hand, activation of a construction permit and construction of a station, even by the owner of another television station in the market . . . increases program choice for viewers, may increase outlet diversity, and increases the amount of advertising time available for sale in the market." Report and Order at ¶ 85. By allowing duopolies in these markets, the Commission can facilitate an increase in the number of stations in a given market, without *any risk* of decreasing the number of voices already heard.

6. In adopting the new duopoly rules, the Commission has stated its desire to "fashion a bright-line test" and move away from the subjective, case-by-case decision making required under prior waiver analysis. Report and Order at ¶ 64. But the duopoly waiver standards allowing ownership of unbuilt stations contains numerous subjective elements. By

making the waiver grant hinge on whether a permittee has made “reasonable” efforts to construct its station and whether the same-market buyer is the “only reasonably available candidate” to build the station, the Commission has reinstated precisely the type of subjective inquiry that it tried to eliminate in adopting its new duopoly rules. Rather than subject a proposed sale to such subjective scrutiny, the Commission should let a free marketplace decide the true value and best use of the unbuilt station. The Commission already recognizes that the duopoly rule should not force a permittee to accept “an artificially depressed price.” Why not allow market forces to govern the disposition of the permit rather than a case-by-case analysis subject to delay and inconsistent rulings?<sup>3/</sup> There is no need to regulate the market in this fashion, as the Commission can trust a permittee to sell the permit to the party who values it most. The Commission explicitly recognized this concept in its recent streamlining initiative, where it lifted long-established restrictions on the sale of unbuilt construction permits for profit. See In re 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 13 FCC Rcd 23056 at ¶¶ 30-34.

7. Kenkel also believes that the Commission should allow duopolies created by the construction of unbuilt stations to be sold freely after construction. In this small subset of the duopolies that will exist once the Commission’s rules take effect, duopolies that in effect have been created “at birth,” stations will be so closely intertwined, both operationally and technically,

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<sup>3/</sup> Such delay can be particularly harmful in this context, given the more rigid three-year construction period recently adopted by the Commission for all unbuilt broadcast stations. Permittees simply cannot afford lengthy administrative processing delays.

that the inability to sell them as a unit will seriously impede the sale of such stations and drastically curtail licensees' ability to benefit from the broadcast growth they will have created. The Commission recognizes that joint ownership of stations results in significant efficiencies in the operation of such stations and results in meaningful public benefits. Report and Order at ¶¶ 1, 7, 34, 37, 40, 57. Co-location and sharing of studio and office facilities of same-market stations, the sharing of administrative and technical staffs, efficiencies in advertising, promotion, gathering news and sales operations become part of the very fabric of a station when that station is initially constructed and operated as part of a duopoly. Forcing such stations to be torn from their sister stations will create unnecessary, viability-threatening upheaval. Accordingly, the Commission should allow the unencumbered sale of duopoly stations when that duopoly is formed as a result of the purchase and construction of an unbuilt analog station.

### **CONCLUSION**

8. The rationale for allowing the unfettered sale of construction permits for analog television broadcast stations should not be lost on the Commission. Indeed, the seeds of the relief requested herein are found in the Commission's own Report and Order. Therein, the Commission has recognized that "the licensing of new NTSC service [is] coming to an end" and that all vacant NTSC channel allotments have been eliminated. Report and Order at ¶ 84. Accordingly, there are few remaining applications or permits for analog stations, and the Commission will not be authorizing more in the future. The Commission has also recognized that there has been an increase in the number and types of media outlets available to local communities and that some of

these alternative technologies have been able to compete more effectively for limited advertising dollars. Report and Order at ¶¶ 7, 28. The Commission has stated its belief that construction and operation of a station, even by a same-market licensee, is of greater public benefit than one that goes unbuilt. Furthermore, the Commission has recognized that the reality of the conversion to digital television and ongoing changes in the media environment mandate that the Commission remain flexible in granting relief from its regulations. In addition, the Commission has repeatedly acknowledged the public service benefits that can be obtained from joint ownership. Finally, the Commission has stated its preference for a bright line test in lieu of subjective waiver standards. Against the backdrop of these clearly stated goals and philosophies, the Report and Order has simply not gone far enough. On reconsideration, the Commission needs to “pull the trigger” on a duopoly exception for all unbuilt analog television stations, particularly given the unique and precarious situation in which these stations find themselves on the eve of the digital age.

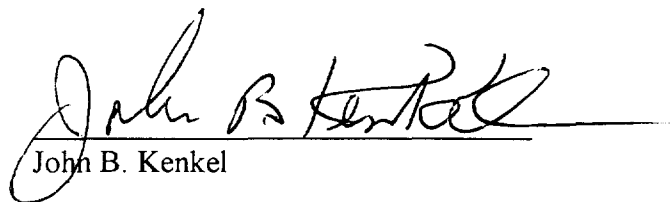
9. In creating its new duopoly rules, the Commission recognized its decision as “an exercise in line drawing.” Report and Order at ¶ 40. But in order to best serve the public interest, the Commission must re-draw the line relating to unbuilt analog stations. Allowing the sale of analog construction permits to in-market station owners would be entirely consistent with the stated goals of the Commission and should be embraced as a method of adding new broadcast facilities to those communities most in need, without the threat of any loss of diversity and competition. This is clearly a situation in which the marketplace can be relied on in lieu of government regulation. For the reasons stated above, acquisitions of all unbuilt stations should be

exempt from the Commission's duopoly rule, and the Commission should permit the unobstructed sale of such duopolies.

Respectfully submitted,

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October 18, 1999